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In the Supreme Court of the United States

October Term, 1976

No. 76-1884

MILTON G. KLEIN,
Director of the Idaho Department of
Health and Welfare, et al.,
Appellants,

vs.

JANE DOE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

JURISDICTIONAL STATEMENT

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SUBJECT INDEX

		Page
I.	Judgment Appealed and Opinion Below	1
II.	Jurisdiction	1
III.	Statute Involved	3
IV.	Questions Presented by this Appeal	3
V.	Statement of the Case	3
VI.	The Questions are Substantial:	
	A. The judicial power of the United States does not extend to matters reserved to the State of Idaho by Act of Congress and the United States Constitution.	6
	B. A state may limit the scope of its Medicaid program by the size of its appropriation for that purpose.	7
	C. The exclusion of non-medically necessary services is consistent with the Social Security Act.	8
	D. The exclusion of non-medically necessary services is not unconstitutional.	12
VII.	Conclusion	17

APPENDIX

	A. Opinion of the District Court	19
	B. Judgment	25
	C. Order Denying Motion for Reconsideration	27
	D. Notice of Appeal	28
	E. Order Denying Motions to Dismiss	30
	F. Challenged regulation	31

CITATIONS

Cases:

	Page
Beal v. Doe, Supreme Court Docket No. 75-554	2, 5
Briarcliff Haven v. Department, (N.D. Ga., 1975) 403 F. Supp. 1355	8
Brotherhood of Locomotive Engineers v. Chicago R.&I., & Pac. RR. Co., (1966) 382 U.S. 423	2
Calder v. Bull, (1798) 3 Dall. 386	6
Califano v. McRae, Supreme Court Docket No. 76-1113	2, 5, 9, 11
Dandridge v. Williams, (1970) 397 U.S. 471	7,13, 14 16, 17,
Doe v. Bolton, (1973) 410 U.S. 179	15, 16
Ferguson v. Skrupa, (1963) 372 U.S. 726	14
Flemming v. Nestor, (1960) 363 U.S. 603	13, 16
Frontiero v. Richardson, (1973) 411 U.S. 677	13
Goldberg v. Kelly, (1970) 397 U.S. 254	16
Jefferson v. Hackney, (1972) 406 U.S. 535	14, 16
King v. Smith, (1968) 392 U.S. 309	2, 7
Lane County v. Oregon, (1868) 7 Wall. 71	6
Lindsley v. Carbonic Gas, (1911) 220 U.S. 61	13
Maher v. Roe, Supreme Court Docket No. 75-1440	2, 5
National League of Cities v. Usery, (1976) — U.S. — 49 L. Ed. 2d 245	6
New York v. Dublino, (1973) 413 U.S. 405	13
Penn Dairies v. Milk Control Commission, (1942) 318 U.S. 261	6
Perez v. Ledesma, (1971) 401 U.S. 82	2
Reed v. Reed, (1971) 404 U.S. 71	13
Richardson v. Belcher, (1971) 404 U.S. 78	13
Roe v. Ferguson, (6th Cir., 1975) 515 Fed. 2d 279	10
Roe v. Norton, (1975) 422 U.S. 391	11
Roe v. Norton, (2d Cir., 1975) 522 Fed. 2d 928	9, 10
Roe v. Wade, (1973) 410 U.S. 113	16
Rosado v. Wyman, (1969) 397 U.S. 397	8
San Antonio v. Rodriguez, (1973) 411 U.S. 1	13
Shapiro v. Thompson, (1969) 394 U.S. 618	16
Stanley v. Georgia, (1969) 394 U.S. 557	16
Stewart v. Butz, (W.D. Ky., 1973) 356 Fed. Sup. 1345	16
Toia v. Klein, Supreme Court Docket No. 75-1749	2, 5
Two Guys v. McGinley, (1960) 366 U.S. 582	2
Union Pacific RR. v. Peniston, (1873) 18 Wall. 5	6
U.S. v. Georgia Public Service Com., (1962) 371 U.S. 285	2
U.S.D.A. v. Moreno, (1973) 413 U.S. 528	13
Weinberger v. Salfi, (1975) 422 U.S. 749	13, 15, 16
Westby v. Doe, Supreme Court Docket No. 75-813	2, 5
Zemel v. Rusk, (1965) 381 U.S. 1	2

CONSTITUTIONAL, LEGISLATIVE AND REGULATIVE PROVISIONS CITED

22 U.S.C.A. 2151	10
28 U.S.C.A. 1253	2
28 U.S.C.A. 2281	4
42 U.S.C.A. 300a-6	10
42 U.S.C.A. 300a-7	10
42 U.S.C.A. 601	7
42 U.S.C.A. 1396	4, 7
42 U.S.C.A. 1396a(a) (10) (B) (i)	5, 11
42 U.S.C.A. 1396a(a) (13) (B)	8
42 U.S.C.A. 1396a(a) (30)	9
42 U.S.C.A. 1396d(a)	8
42 U.S.C.A. 2996f(b) (8)	10
26 Statutes at Large 215	7
Public Law 94-439	10

1976 Idaho Session Laws, Chapter 339, Section 3 .. 3
Section 56-209c, *Idaho Code* 5

Constitution of the United States, Tenth Amendment 6
Constitution of the State of Idaho 6

45 C.F.R. 250 ..... 9, 17
Appellants' Manual of Operating Policies and Procedures, Section 3162.2 13

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

JURISDICTIONAL STATEMENT

Appeal from the opinion and judgment of the three judge panel of the United States District Court for the District of Idaho and all orders and actions necessary to support that judgment. The opinion of the panel is unreported and appended to this statement as "Exhibit A". The judgment based on the Court's opinion was entered April 7, 1977 and appended as Exhibit "B".

II.
JURISDICTION

Appellees brought this action challenging an appropria-

tion measure of the State of Idaho on the grounds that it conflicted with Title XIX of the Social Security Act, 42 U.S.C.A. 1396 et seq., and violated the Fourteenth Amendment to the Constitution of the United States. Jurisdiction of the District Court was invoked under 28 U.S.C.A. §§1331, 1343(3) and 1343(4). Seeking declaratory relief, Appellees sought to have the appropriation measure and the implementing administrative regulation declared void and their operation enjoined. Pursuant to 28 U.S.C.A. 2281 a three judge panel was convened, considered the parties cross-motions for summary judgment, and concluded that the appropriation and regulation conflicted with the Social Security Act. Orders of the Court granted injunctive relief.

Jurisdiction of the Supreme Court to hear this appeal arises under 28 U.S.C.A. 1253,

> "... from an order granting or denying ... an interlocutory or permanent injunction in any civil action ... required by Act of Congress to be heard and determined by a district court of three judges."

Cases upholding the jurisdiction of the Supreme Court in this case include:

Brotherhood of Locomotive Engineers v. Chicago, R.I., & P.R.R., Co. (1966) 382 U.S. 423;
Zemel v. Rusk (1965) 381 U.S. 1;
Two Guys v. McGinley (1960) 366 U.S. 582;
Perez v. Ledesma (1971) 401 U.S. 82;
U.S. v. Georgia Public Service Comm. (1962) 371 U.S. 285;
King v. Smith (1968) 392 U.S. 309.

In addition, the Court has noted probable jurisdiction or granted certiorari in the following analogous cases:

Beal v. Doe, #75-554
Maher v. Roe, #75-1440
Westby v. Doe, #75-813
Toia v. Klein, #75-1749
Califano v. McRae, #76-1113

III.
STATUTE INVOLVED

Section 3, Chapter 339, 1976 *Idaho Session Laws* provides:

> No funds available to the department of health and welfare, by appropriation or otherwise, shall be used to pay for abortions, unless it is the recommendation of two (2) consulting physicians that an abortion is necessary to save the life or health of the mother, or unless the pregnancy is a result of rape or incest as determined by the courts.

IV.
QUESTIONS PRESENTED

A. Does the judicial power of the United States extend to matters reserved to the State of Idaho by the Tenth Amendment to the Constitution of the United States and Act of Congress?
B. May a state limit the scope of Medicaid participation by the size of legislative appropriation?
C. Is the exclusion of non-medically necessary Medicaid services inconsistent with Title XIX of the Social Security Act, 42 U.S.C.A. 1926 et seq.?
D. Is the exclusion of non-medically necessary Medicaid services unconstitutional?

V.
STATEMENT OF THE CASE

This action was brought initially by two plaintiffs. One physician seeking reimbursement for his services under the Idaho Medicaid program and a woman who, when the suit was filed, was pregnant and eligible to receive benefits under the Idaho Medicaid program. Plaintiffs challenged a certain appropriation measure of the State of Idaho and an administrative regulation of the Idaho Department of

Health and Welfare which excluded non-medically necessary abortions from the scope of services reimbursable under the program. Appellants and defendants below, are the State of Idaho, the Department of Health and Welfare, and three officials of the Department of Health and Welfare charged with administering the Idaho Medicaid program.

Plaintiffs' motion to have the action certified as a class action was denied. Subsequently twenty-one additional recipients joined in the action. By temporary restraining order, the operation of the law and regulation were stayed pending final disposition by the District Court.

Pursuant to 28 U.S.C.A. 2281 (in effect prior to August 12, 1976) the Honorable J. Blaine Anderson concluded that the constitutional questions were substantial and a three judge panel was convened.

Each of the recipient-plaintiffs claimed that the law and regulation operated so as to deny their rights to receive non-medically necessary abortions. Each sought her abortion for personal reasons unrelated to the protection of her life or health. The physician-plaintiff claimed that the law and regulation violated his right to practice medicine. It was alleged, and the physician-plaintiff so testified, that if he were paid, the services sought would be rendered. With each plaintiff, payment, not health, was the determinative factor.

Plaintiffs challenged the law and regulation as being (1) inconsistent with Title XIX of the Social Security Act, 42 U.S.C.A. 1396 et seq., (2) violative of a pregnant woman's Fourteenth Amendment right to equal protection of law, and (3) violative of the plaintiff-physician's right to practice medicine. The physician-plaintiff acknowledged a non-medically necessary abortion in the first two trimesters was not criminally sanctioned under Idaho law. In their prayer for relief, plaintiffs asked that the law and regulation be

declared unconstitutional and violative of the Social Security Act and that the operation of the law and regulation be enjoined.

The three judge panel in its *per curiam* opinion concluded that the law and regulation conflicted with the "equality requirement" of Section 1902 of the Social Security Act, 42 U.S.C.A. 1396a(a)(10)(B)(i).

Notwithstanding the operation of the law and regulation Plaintiff Carolyn Coe received an abortion prior to seeking joinder as a party plaintiff. Eight other plaintiffs (Betty Roe, Wanda Woe, Kathy Koe, Zelda Zoe, Molly Moe, Debbie Doe, Sally X and Elizabeth Y) received abortions before the operation of the law and regulation were suspended, by temporary restraining order, as to them.

Knowing of the District Court's decision, the Idaho Legislature in its 1977 session enacted the identical language of the challenged appropriation law as a substantive statute. Title 56, Chapter 2, Section 209c, *Idaho Code*.

VI.
THE QUESTIONS ARE SUBSTANTIAL

This is a Medicaid abortion case. The questions presented by this appeal concern the power of the State of Idaho to prohibit the expenditure of state funds for non-medically necessary abortions. Thus, the case is analogous, in various degrees, with four other cases presently before the Court.[1] In addition, the Court has before it the federal case of *Califano v. McRae*, #76-1113 containing a similar prohibition in the appropriation by Congress to the Department of

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[1]Two of these present the statutory question. *Beal v. Doe*, #75-554 and *Westby v. Doe*, #75-813. The other two present constitutional questions. *Maher v. Roe*, #75-1440 and *Toia v. Klein*, #75-1749.

Health, Education and Welfare.

However, this case is materially different from the other state cases in that the challenged law was an appropriation measure. Basic principals of federalism relating to the scope of federal judicial power arise from this distinction.

A. The judicial power of the United States does not extend to matters reserved to the State of Idaho by the Tenth Amendment and Act of Congress.

Under our federal system, the member states have ceded various powers to the federal government. Just as federal courts are courts of limited jurisdiction, the federal government is a government of limited powers. *Calder v. Bull* (1798) 3 Dall. 386, 387. This is made clear by the Tenth Amendment, providing:

> The powers not delegated to the United States, nor prohibited by [the Constitution] to the states, are reserved to the states respectively, or to the people.

The powers of a state to raise money by taxation and to spend money by appropriation are acts of the state arising from its role of a sovereign. *Union Pacific R.R. v. Peniston* (1873) 18 Wall. 5; *Lane County v. Oregon* (1868) 7 Wall. 71. These powers are guaranteed by the Tenth Amendment which limits the powers of all three branches of the federal government, including the judicial branch. Once reserved to the states, these powers may not be abrogated by a federal court. Such abrogation would destroy the state's ability to assume its role in our federal union. *Penn Dairies v. Milk Control Comm.* (1942) 318 U.S. 261; *National League of Cities v. Usery* (1976) — U.S. — ; 49 L.Ed. 2d 245.

Article VII, Section 13 of the *Constitution of the State of Idaho* provides:

> No money shall be drawn from the treasury, but in pursuance of appropriations made by law.

This language was present in the State's Constitution upon

Idaho's admission to the Union, and reserved to the State by Congress. Congress declared:

> [T]he State of Idaho is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever; and that the constitution which the people of Idaho have formed for themselves be, and the same is hereby, accepted, ratified, and confirmed. 26 S.L. 215.

The relief granted by the District Court required Appellants to expend state funds which had not been appropriated. This relief exceeds the judicial power of the United States as limited by the Tenth Amendment and Act of Congress. Appellants submit that what has been reserved to them should not be usurped by the federal courts.

B. A state may limit the scope of Medicaid participation by the size of its appropriation for that purpose.

The purpose of the Medicaid program is found in Section 1901 of the Social Security Act providing:

> For the purpose of enabling each State, as far as practicable under the conditions of such State, to furnish (1) medical assistance ... [to those] whose income and resources are insufficient to meet the costs of necessary medical services ... 42 U.S.C.A. 1396.

The phrase "as far as practical under the conditions in such state" is a term of art having specific legal meaning. The phrase is found in Title IV of the Social Security Act, 42 U.S.C.A. 601. In the case of *Dandridge v. Williams* (1970) 397 U.S. 471, the Supreme Court was called upon to interprete this phrase as used in Title IV and concluded that this was a grant of "great latitude in dispensing [the state's] available funds." 397 U.S. at 478; see also *King v. Smith* (1968) 392 U.S. recognizing the power of the states "to determine the level of benefits by the amount of funds it devotes to the program." 392 U.S. at 318-319. One federal

district court has recognized that the two are synonomous. *Briarcliff Haven v. Department* (N.D. Ga., 1975) 403 F. Supp. 1355 at 1361. Moreover after the Supreme Court gave the phrase its meaning as a term of art, Congress amended Section 1901, but did not alter the language. Appellants submit that Congress thereby adopted the judicial gloss of the terms.

It should be noted that the State of Idaho is not attempting to limit its funding for the program to such an extent that mandatory, medically necessary services are excluded. Arguably once the state elects to participate in the Medicaid program it must provide funding for those mandatory services enumerated in Sections 1902 and 1905 of the Act, 42 U.S.C.A. 1396(a) (13) (B); 42 U.S.C.A. 1396d(a). Appellants submit that the requirement of medical necessity cuts across all of the mandatory services. While a state may provide additional services (e.g. "any other type of remedial care;" Section 1905(a) (6), 42 U.S.C.A. 1396d(a) (6)), the state is not required to do so.

Appellants submit that lack of appropriation is a "condition" which makes impracticable funding for non-medically necessary abortions within the meaning of Section 1901 of the Act.

C. The exclusion of non-medically necessary procedures is consistent with the Social Security Act.

There is nothing in Title XIX of the Social Security Act expressly requiring or prohibiting (at least prior to October 1, 1976) payment for non-medically necessary abortions. Thus, to paraphrase Mr. Justice Harlan, we must find congressional intent without a compass. *Rosado v. Wyman* (1969) 397 U.S. 397, 412. It is Appellants' position that payment for non-medically necessary abortions was not required by the Act. In addition, Appellants urge that if Con-

gress had expressed its intent, non-medically necessary abortions would have been excluded from the scope of Title XIX. Finally, Appellants urge that passage of Section 209 of Public Law 94-439 makes it clear that Congress did not, and does not, intend Title XIX to require payment for those procedures. (It should be noted that a challenge to Section 209 is presented in *Califano v. McRae*, #76-1113.)

The purpose of the Medicaid program is to provide necessary medical care to eligible individuals. Section 1901 of the Act, 42 U.S.C.A. 1396, set out above. Elsewhere in Title XIX, the state is required to adopt a utilization review program to ensure that funds are not expended for unnecessary services. Section 1902 of the Act provides in part:

> (30) [A state plan must] provide such methods and procedures relating to the utilization of and payment for, care and services available under the plan as may be necessary to safeguard unnecessary utilization of such care and services ... 42 U.S.C.A. 1396a(a) (30).

The Department of Health, Education and Welfare, the agency charged with administering the Medicaid program at the federal level, has implemented regulations defining the utilization control program. 45 C.F.R. Part 250. This program is to safeguard "against unnecessary or inappropriate utilization of care and services." 45 C.F.R. 250.18(a).

It was the position of the Department of Health, Education and Welfare prior to October, 1976 that the Social Security Act neither required nor prohibited payment for non-medically necessary abortions. Two decisions of the United States Courts of Appeal confirmed this position. *Roe v. Norton* (2d Cir., 1975) 522 Fed. 2d 928 and *Roe v. Ferguson* (6th Cir., 1975) 515 Fed. 2d 279. Both reversed district court decisions that the exclusion was inconsistent with the Act. The *Norton* Court emphasized the position of H.E.W. presented it in a brief of the Solicitor General stating:

> [I]t is the position of the Secretary of Health, Education and Welfare that title XIX of the Social Security Act neither compels nor prohibits payment for abortions which are not medically necessary.

If Congress had expressly declared its intention, non-medically necessary abortions would have been excluded from the Act. On those occasions when Congress has addressed abortion problems, Congress has relegated abortion to a disfavored status. For example the Family Planning Services and Population Act of 1970 (42 U.S.C.A. 300a-6) specifically excludes abortion as a method of family planning. Similarly, in establishing the Legal Services Corporation System, Congress provided that the corporation could not provide legal assistance to those seeking non-medically necessary abortions 42. U.S.C.A. 2996f(b) (8). Other examples include the Health Services Extension Act of 1975 (42 U.S.C.A. 300a-7), which contains a conscience clause which prohibits compelling recipients of federal funds to perform abortions; and the Foreign Assistance Act of 1973 (22 U.S.C.A. 2151*l*) which prohibits the use of funds to pay for abortions.

When Title XIX was enacted, most states restricted abortions by criminal sanction. Congress could not have intended to subsidize what was then criminal conduct. See, *Roe v. Norton,* 522 Fed. 2d at 935; *Roe v. Ferguson,* 515 Fed. 2d at 283.

Finally, Congress has revealed its intention and excluded non-medically necessary abortions from Medicaid reimbursement. Section 209 of the General Provisions of the Departments of Labor and Health, Education and Welfare and Related Agencies Appropriation Act of 1977 (P.L. 94-439) provides:

> None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.

When Section 209 became effective on October 1, 1976, the Secretary of the Department of Health, Education and Welfare was restrained from implementing this exclusion. Ultimately the Secretary was enjoined and the matter appealed to this Court. *Califano v. McRae,* #76-1113. It is appropriate for the Court to consider Congressional actions after a suit is filed. *Roe v. Norton* (1975) 422 U.S. 391.

Even while Section 209 is enjoined, the intention of Congress is explicit: the exclusion of reimbursement for non-medically necessary abortions is consistent with the Social Security Act.

In the present case, the *per curiam* opinion found that Idaho's exclusion conflicted with the so-called "equality requirement" found in Section 1902(a) (10) (B) (i) of the Act, 42 U.S.C.A. 1396a(a) (10) (B) (i). However, this provision provides that under the state plan, medical assistance made available to any eligible individual "shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual." The record before the District Court was devoid of any indication that the State of Idaho rendered non-medically necessary abortions to any person, whether or not they received medical assistance. Of course, citizens of the State of Idaho may receive such abortions. But the State of Idaho does not provide such abortions, and will not unless the provisions of the challenged law and regulation are met. All medical assistance recipients are treated equally. And even if (and the record does not support the proposition) the State of Idaho rendered abortion services outside the medical assistance program, such services would be prohibited by the challenged law and regulation.

Moreover, a literal reading of the "equality requirement" does not support the District Court's conclusion. The clause immediately before the "equality requirement" identifies

the categories of recipients who are eligible for medical assistance. Those categorical recipients are the "such individuals" referred to in the clause. The "equality requirement" merely recognizes that recipients of each category receive the same degree of medical assistance under the state plan.

In addition the District Court ruled that the exclusion impermissably encroached on a physician's choice of alternative forms of treatment. Again, the requirement of medical necessity limits the full scope of devices reimbusable under the Medicaid program. The Medicaid program is not a national health insurance program; nor is it a guaranteed annual wage program for physicians. It is merely designed to provide necessary health services to those who can't afford them. Nothing more is required by Congress. Nothing more is intended by the State of Idaho.

D. The exclusion of non-medically services is not unconstitutional.

In countering Appellees' constitutional attack, Appellants urge principals enunciated by this Court namely: (1) that in the area of social economic and welfare, a classification will be upheld against equal protection attack so long as the classification reasonably furthers a legitimate legislative purpose; (2) that the various moral value judgments impinging on this cause are properly legislative and not judicial functions; (3) that policies challenged on due process grounds will be upheld so long as they do not evidence a patently arbitrary or invidious discrimination; and (4) that states are permitted to use reasonable administrative tools which are necessary to assure the goals of the Medicaid program and which do not constitute an invidious discrimination.

In the areas of social economic welfare, a classification

will be upheld against equal protection attack so long as there is some rational basis between classification and its purpose. *Dandridge v. Williams* (1970) 397 U.S. 471; *U.S.D.A. v. Moreno* (1973) 413 U.S. 528; *Lindsay v. Carbonic Gas* (1911) 220 U.S. 61; *San Antonio v. Rodriguez* (1973) 411 U.S. 1; *Weinberger v. Salfi* (1975) 422 U.S. 749; *Fleming v. Nestor* (1960) 363 U.S. 603; *Richardson v. Belcher* (1971) 404 U.S. 78; *New York v. Dublino* (1973) 413 U.S. 405.

Sexual classifications are not inherently suspect. This Court has repeatedly declined to apply the strict scrutiny test applicable to suspect classifications. *Reed v. Reed* (1971) 404 U.S. 71; *Frontiero v. Richardson* (1973) 411 U.S. 677.

As is usual in equal protection cases, the manner by which the affected classes are defined determines the outcome. It is therefore imperative to identify the policy effectuated by the challenged law and regulation and define the classes accordingly.

It is the general policy of the Idaho Medicaid program not to pay for elective or cosmetic services. (See Section 3162.2 appended hereto as Exhibit "F.") In passing the challenged law, the Legislature in effect declared that abortion services were to be treated no differently than other services under the program. Even though Appellants paid for all abortion services prior to passage of the law, the Legislature clearly repudiated this policy and reaffirmed the general policy of non-payment for elective or cosmetic services.

This is clearly the prerogative of the legislative branch of our government, a prerogative that in effect preempts the executive and judicial branches when exercised reasonably. Various decisions of this Court make it clear that the weighing of moral and social issues is within the province of

the legislative branch. In *Dandridge v. Williams* (1970) 397 U.S. 471 it was noted:

> "[T]he Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." 397 U.S. at 486.

In *Ferguson v. Skrupa* (1963) 372 U.S. 726 the Court said:

> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." 372 U.S. at 730.

In *Jefferson v. Hackney* (1972) 406 U.S. 535 the Court noted that the states were given broad discretion in fashioning the A.F.D.C. program, Title IV of the Social Security Act, and that the Court could not limit the discretion of the states "simply for policy reasons of which we are not the arbiter." 406 U.S. at 545.

Appellees urged that there was no legitimate purpose in paying for costs of birth and support for the child after birth, but not paying for the comparatively minimal costs of non-medically necessary abortions. Clearly the Idaho Legislature was motivated by other than purely fiscal purposes. The Legislature balanced a myriad of competing interests, including those related to abortion. The legislative decision does not have to be correct in an absolute sense. All that need be shown is that the legislation is reasonably related to a legitimate purpose. *Dandridge v. Williams* (1970) 397 U.S. 471 at 487.

At least three legitimate purposes may be found in the decision embodied in the challenged law. First, the Legislature balanced the competing interests in the "right to abortion" versus "right to life" debate and concluded that public tax revenue should not be used for non-medically necessary abortions. Second, in its role as overseer of the executive agencies and their programs, the Legislature determined to

underwrite the cost of certain welfare programs and refused to underwrite others. The Medicaid program is essentially a form of health insurance wherein the taxpayers pay for certain services to eligible persons. Like other forms of insurance, it is the prerogative of the underwriter to incur certain risks and exclude others from coverage. Thus the underwriter chose to exclude non-medically necessary abortions from coverage with full knowledge that pre-natal and post-partum care would be covered, as well as support of the child so long as the parent remains eligible for benefits. Similar "risk assumption" analysis was specifically approved by this Court in *Weinberger v. Salfi* (1975) 422 U.S. 749 at 776. Third, the Legislature determined that the medical assistance program should be limited to medically necessary services. Again, this is a legitimate legislative function.

In defining their classes, Appellees misinterpreted the focus of the Medicaid program. That focus is neither upon pregnancy nor abortion. It is a program designed to provide medical services which are necessary for the recipient's health. Abortion, like any other service, is paid for under the program if it is medically necessary. Appellees overlook the fact that not only does the program exclude payment for elective abortions, the program also excludes all other elective procedures, including elective prenatal and postnatal care. A policy which attempted to exclude from coverage a medical procedure which was necessary for the patient's health might well run afoul of the Fourteenth Amendment. That is not the case here.

The decisions of *Roe v. Wade* and *Doe v. Bolton* cannot be read to authorize abortion on demand. *Roe v. Wade* (1973) 410 U.S. 113 and *Doe v. Bolton* (1973) 410 U.S. 179, stand generally for the proposition that a woman has a right to decide to have an abortion free from undue state restriction.

However, the cases do not stand for the proposition that a woman has a right to an abortion at state expense. Mr. Chief Justice Burger made this clear in his opinion, saying "Plainly, the Court today rejects any claim that the Constitution requires abortion on demand." 410 U.S. at 208. This is amplified in *Bolton:*

> "*Roe v. Wade,* supra, set forth our conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand. What is said there is applicable here and need not be repeated." 410 U.S. at 189.

There is no constitutional right to receive welfare benefits. Despite repeated requests, this Court has consistently declined to elevate the receipt of welfare benefits to a level of constitutional entitlement. *Dandridge v. Williams* (1970) 397 U.S. 471; *Goldberg v. Kelly* (1970) 397 U.S. 254; *Stewart v. Butz* (W.D. Ky. 1973) 356 F. Supp. 1345, 1349; *Fleming v. Nestor* (1960) 363 U.S. 603, 611; *Weinberger v. Salfi* (1975) 422 U.S. 749, 772; *Jefferson v. Hackney* (1972) 406 U.S. 535.

A state is not required to pay for the exercise of constitutional rights. As stated previously, *Roe v. Wade* and *Doe v. Bolton* recognize the constitutionally protected right to decide to have an abortion. They do not extend to require payment for the exercise of that right. Similarly, there is a fundamental right to travel among the states. *Shapiro v. Thompson* (1969) 394 U.S. 618. No case has held that the transportation costs for the indigent must be paid by the state. A person has the right to possess obscene materials in his own home. *Stanley v. Georgia* (1969) 394 U.S. 557. But the state is not required to furnish these materials to an indigent. The fundamental rights of freedom of speech and press do not impose a duty for the state to pay for the exercise of those rights.

The requirement of physician certification is a valid administrative tool. While the Social Security Act contains basic requirements and general guidelines, the administration of the Medicaid program is given to the states. This court has interpreted the states' administrative discretion to include those steps which are necessary and reasonable to administer a program of the enormous size and complexity of the Medicaid program. This court has required only that the states use a reasonable tool, free from invidious discrimination, in an effort to achieve a legitimate administrative purpose. *Dandridge v. Williams* (1970) 397 U.S. 471.

Appellants have been mandated to ensure that Medicaid funds are expended for medically necessary services covered by the program. The persons who are required to approve claims for payment of covered services are not medical personnel. Certainly in the area of abortion services where the potential for abuse is greatest, the additional requirement is justified. At any rate, the requirement of professional review is widely recognized as a legitimate tool to review and control the appropriateness of the claimed services. See, e.g. 45 C.F.R. 250.19(a) (2) (ix) (H).

VII.
CONCLUSION

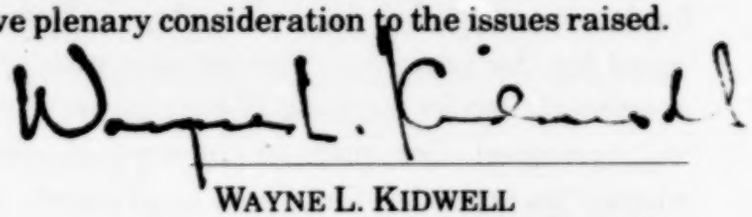
The Medicaid program has been described as an effort in cooperative federalism wherein Congress prescribes the basic outline and the states administer the program. Cooperation is necessarily a working relationship wherein both the states and the federal government work closely to achieve common goals. If the states are to be anything more than mere federal agents, their legitimate administrative powers must once again be recognized by this Court.

If the purpose of the Medicaid program is to make available necessary medical services to eligible persons, the power of the states to exclude non-necessary services must

be affirmed. If the states are required to remain neutral in the abortion decision, then, since payment and not medical necessity is the determinative factor under the facts of this case, the state must be allowed not to pay for non-medically necessary abortions. If the states are expected to assume a meaningful role in our federal system, they must be allowed to exercise certain fundamental powers, namely to expend funds through appropriation.

Based upon the foregoing, Appellants respectfully request that the Supreme Court of the United States accept jurisdiction of this appeal, accept briefs on the merits of the appeal, and give plenary consideration to the issues raised.

June, 1977.



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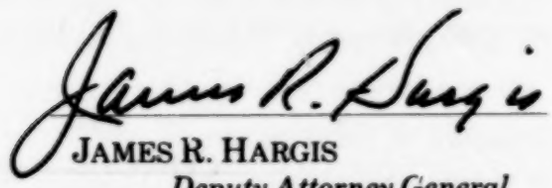
State of Idaho



JAMES R. HARGIS
Deputy Attorney General

On the brief: James Wickham
Assistant Attorney General

Attorneys for Appellants

APPENDIX "A"
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-134
March 22, 1977

JANE DOE, et al.,

Plaintiffs,

v.

MILTON G. KLEIN,
Director of the Idaho Department of
Health and Welfare, et al.,

Defendants.

OPINION

Before: KOELSCH, Circuit Judge, and McNICHOLS and TAYLOR, District Judges

PER CURIAM:

The question in this case is whether the Department of Health and Welfare of the State of Idaho, despite a recently enacted state statute which provides that "[n]o funds available to the department of health and welfare, by appropriation or otherwise, shall be used to pay for abortions, unless it is the recommendation of two (2) consulting physicians that an abortion is necessary to save the life or health of the mother, or unless the pregnancy is the result of rape or incest as determined by the courts" (S.B. No. 1548(3), ch. 339, §3 [1976] Idaho Session Laws 1130; hereafter "Section Three") must nevertheless pay the medical expenses of an indigent incident to a "nontherapeutic" abortion.[1]

All material facts are undisputed, and the matter is pending on cross-motions for summary judgment.

With the exception of Dr. Glenn H. Weyhrich, plaintiffs[2]

have been duly certified by the Department as eligible for medical assistance under the State's Medicaid program.[3] They are pregnant, and although their individual conditions pose no threat to their health or lives and are not the result of rape or incest, they wish to secure abortions. They are unable personally to bear the expense, and Dr. Weyhrich a co-plaintiff, although willing to perform the necessary operations, will do so only if paid for his professional services. The Department, however, relying upon the statute and its implementing regulations, refuses.

Plaintiffs contend that the provisions of Section Three are invalid because they (1) are incompatible with the governing federal statute, Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* (and therefore invalid under the supremacy clause, Article VI of the federal constitution), and (2) deny plaintiffs Doe, etc., the equal protection of the laws guaranteed them by the Fourteenth Amendment.

We do not reach the constitutional claim (*Hagans v. Lavine,* 415 U.S. 528, 543-545 (1974); *Westby v. Doe,* 420 U.S. 968 (1975)) as we are satisfied that Section Three is incompatible with Title XIX. In so concluding, we follow the well-reasoned opinion of Judge Van Dusen, writing for the Third Circuit in *Doe v. Beal,* 523 F. 2d 611 (3rd Cir. 1975) (in banc), *cert. granted,* — U.S. —, 96 S. Ct. 3220 (1976). In *Beal,* the court held certain regulations of the Pennsylvania Department of Public Welfare which in effect denied physicians reimbursement under that State's Medicaid program for abortions performed at the patient's sole election inconsistent with the provisions of Title XIX and enjoined their enforcement.[4]

In this case, as in *Beal,* defendants contend that in the allocation of federal welfare aid within their jurisdictions the states have "great latitude in dispensing [their] available funds." *Dandridge v. Williams,* 397 U.S. 471, 478

(1970).

True, the Social Security and like social welfare programs financed largely by federal matching funds and administered by the states represent "scheme[s] of cooperative federalism" (*King v. Smith,* 392 U.S. 309, 316 (1968)) under which the states have "considerable latitude in allocating their ... resources ...." *Id.* at 318. *See also Jefferson v. Hackney,* 406 U.S. 535 (1972); *New York Dept. of Social Services v. Dublino,* 413 U.S. 405 (1973); but it is equally true, and dispositive of the defendants' contention, that the latitude accorded the states under the Social Security Act is not unlimited. A state's modification of particular features of the Act is impermissible where "the method it has chosen clearly conflicts with the Act." *King v. Smith, supra,* at 327. It is unnecessary here to develop in detail the manner in which Section Three is inconsistent with the explicit requirements of Tital XIX. The court in *Doe v. Beal* thoroughly explicated that question in concluding that "the congressional hand has been rather heavy in circumscribing the area of state prerogative [under Title XIX]." 523 F. 2d at 619. The Court of Appeals for the Third Circuit found the regulation there in issue sufficiently inconsistent with the Act to warrant injunctive relief. We are unable to distinguish that regulation from the Idaho statute.

Idaho, having determined that the physical condition of pregnancy[5] warrants Medicaid assistance, cannot justifiably decline to finance some forms of medical treatment (that is, elective abortions) while continuing to reimburse physicians furnishing alternative forms of treatment (for example, therapeutic abortions or full-term delivery services). To do so contravenes two congressional policies embodied in Title XIX.

First, such a limitation on the choice of treatment offends the so-called "equality requirement" of 42 U.S.C. §1936a(a)

(10) (B) (i) under which assistance to those such as plaintiff Doe eligible for categorical aid "shall not be less in amount, duration or scope than the medical assistance made available to any other such individual." *Doe v. Beal, supra,* at 617; *Coe v. Hooker,* 406 F. Supp. 1072, 1084-1085 (D.N.H. 1976).

Moreoever, in so circumscribing the physician's choice among alternative forms of treatment for the condition of pregnancy, Section Three significantly encroaches upon the physician's exercise of professional discretion. In the words of the *Beal* court, "[i]t is ... apparent that Congress intended to place the primary authority for determing what treatment a particular recipient requires in the hands of the attending physician." 523 F. 2d at 618. *Accord: Roe v. Norton,* 522 F. 2d 928, 934 (2nd Cir. 1975); *Coe v. Hooker, supra,* at 1082. Regard for the physician-patient relationship has particular force here where "the closeness of the relationship is patent" and "the constitutionally protected abortion decision is one in which the physician is intimately involved. *See Roe v. Wade,* 410 U.S. at 153-156...." *Singleton v. Wulff,* — U.S. —, 49 L.Ed.2d 826, 835 (1976).

Because Idaho, in extending Medicaid assistance in the case of full-term deliveries and therapeutic abortions, has determined that pregnancy is a condition for which medical treatment is necessary within the meaning of Title XIX, it cannot decline to finance nontherapeutic abortions consistent with the requirements of Title XIX.

No useful purpose would be served by permitting this case to proceed as a class action; because we hold that plaintiffs are entitled to a declaratory judgment, the relief granted will accrue to those similarly situated within the State of Idaho in any event. *See Craft v. Memphis Light, Gas and Water Division,* 534 F. 2d 684, 686 (6th Cir. 1976); *Doe v. Wohlgemuth,* 376 F. Supp. 173, 182 (W.D. Pa. 1974),

vacated on other grounds sub nom. Doe v. Beal, supra.

Plaintiffs are entitled to judgment declaring Section 3 inconsistent with Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.* Defendants' motion for summary judgment is denied; plaintiffs' request for attorneys' fees is denied. Counsel for plaintiffs is requested to submit a proposed order and judgment. No costs.

/s/ M. OLIVER KOELSCH
Circuit Judge

/s/ RAY MCNICHOLS
District Judge

/s/ FRED M. TAYLOR
District Judge

FOOTNOTES

[1]An abortion is "nontherapeutic" (or "elective") when elected by the patient in consultation with her physician and not medically indicated by a threat to the life or health of the mother or the possibility of fetal defect if the pregnancy is carried to term. *See* 4B Gordy & Gray, *Attorneys' Textbook of Medicine*, ¶311.50 *et seq.*

[2]Following an evidentiary hearing on plaintiffs' application for emergency relief, a single district court judge ordered a three-judge district court empaneled under 28 U.S.C. §2281 *et seq.* and entered a temporary restraining order authorized by 28 U.S.C. §2284(3) pending determination by the full court. To date, twenty additional women whose situations are similar to that of Jane Doe have sought to intervene and have been permitted to join this action as parties plaintiff; nineteen of those have obtained temporary injunctive relief under the terms of the court's provisional order.

[3]Authorized by Title XIX of the Social Security Act, 42 U.S.C. §1369 *et seq.* The statutory structure of Medicaid contemplates the development of medical assistance plans by participating states in conformity with the statutory criteria and subject to approval by the Secretary of Health, Education and Welfare. Participation by the states is voluntary, but the medical assistance plans of those so electing must meet minimum Title XIX requirements in order to qualify for federal financial assistance. *Compare* the exposition in *Doe v. Mathews*, 420 F. Supp. 865 (D.N.J. 1976).

[4]Other courts in addition to the Third Circuit have held state laws prohibiting payment of Medicaid benefits for "nontherapeutic" abortions inconsistent with Title XIX. *See Coe v. Hooker*, 406 F. Supp. 1072 (D.N.H. 1976); *Doe v. Westby*, 402 F. Supp. 140 (D.S.D. 1975) *on remand* from 420 U.S. 968 (1975). *But see Roe v. Ferguson*, 515 F. 2d 279 (6th Cir. 1975) *rev'g* 389 F. Supp. 393. *See also Roe v. Norton*, 522 F. 2d 928 (2d Cir. 1975) *rev'g* 380 F. Supp. 726 (Medicaid permits payments of benefits for nontherapeutic abortions but it does not require it), and *Doe v. Rose*, 499 F. 2d 1112 (10th Cir. 1974) (declining to decide the statutory question but affirming entry of injunctive relief on equal protection grounds).

[5]*Cf. Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974); *General Electric Co. v. Gilbert*, — U.S. — (1976).

APPENDIX "B"
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-134
April 7, 1977

JANE DOE, et al.,
Plaintiffs,

v.

MILTON G. KLEIN,
Director of the Idaho Department of Health and Welfare, et al.,
Defendants.

ORDER AND JUDGMENT

This action came on for hearing on October 29, 1976, on Cross Motions for Summary Judgment before the Court, District Judge Ray McNichols, District Judge Fred M. Taylor and Circuit Judge Oliver M. Koelsch, and, the issues having been duly heard and an Opinion having been duly rendered on March 22, 1977, therefore;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs are entitled to partial Summary Judgment and to a Declaratory Judgment as follows:

1) That Section 3 of Chapter 339, Idaho Session Laws (1976), and Section 3164.9 of the Idaho Department of Health and Welfare, Manual of Operating Policies and Procedures, Volume III, are inconsistent with the provisions of Title XIX of the Social Security Act, 42 U.S.C. §§1396 *et seq.*, and therefore unlawful and unenforceable under the Supremacy Clause of the United States Constitution.

2) That Defendants, their successors in office, agents, and employees and all others in active concert and participation with them, by reason of this Declaratory Judgment and

determination are prohibited from enforcing the above statute and regulation against any of the named Plaintiffs and are ordered to reimburse the named Plaintiffs for the reasonable medical expenses in connection with the abortion services they performed or received during the pendency of this action in the same manner and to the same extent other services are reimbursed by Defendants, and that this relief shall accrue in the future to all those similarly situated within the State of Idaho.

3) That Defendants shall forthwith notify by circular letter all eligibility examiners and all social service staff of the Idaho Department of Health and Welfare and by memorandum all hospitals and physicians in the State of Idaho of the Opinion, Order and Judgment issued in this matter and informing them of the effect of said Opinion, Order and Judgment.

4) That the Bond of Indemnity heretofore ordered to be posted by Plaintiff Glenn H. Weyhrich, M.D., be and the same hereby is exonerated.

5) Plaintiffs' motion for certification of this case as a class action is denied.

6) Plaintiffs' request for attorneys' fees and costs is denied.

7) This Order and Judgment is issued as a supplement to the Order previously issued in this matter on March 18, 1977.

M. OLIVER KOELSCH
United States Circuit Judge

RAY MCNICHOLS
United States District Judge

FRED M. TAYLOR
United States District Judge

APPENDIX "C"
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-134
April 7, 1977

JANE DOE, et al.,
Plaintiffs,
v.
MILTON G. KLEIN,
Director of the Idaho Department of Health and Welfare, et al.,
Defendants.

ORDER DENYING MOTION TO RECONSIDER

The court has, as of March 22, 1977, filed an Opinion in this matter and has left open the form of final judgment.

The Defendants have moved to have a delay in the Entry of Judgment and/or for a Motion to Reconsider the Opinion. The Court has carefully considered the showing made and determines that nothing presented in either motion represents anything new, and that the issues raised have been heretofore considered by the Court and determined adversely to the position taken by the Defendants.

IT IS THEREFORE ORDERED:

1. That the Motion of the Defendants to delay Entry of Judgment be, and the same hereby is, denied.

2. That the Motion of the Defendants to Reconsider the Opinion be, and the same hereby is denied.

/s/ RAY MCNICHOLS
RAY MCNICHOLS, JUDGE
United States District Court
By Direction of the Court

APPENDIX "D"
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-134
April 29, 1977

JANE DOE, et al.,
Plaintiffs,
v.
MILTON G. KLEIN,
Director of the Idaho Department of
Health and Welfare, et al.,
Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that pursuant to 28 U.S.C. 1253, 28 U.S.C. 2101 and 28 U.S.C. 2281 (in effect prior to August 12, 1976) the above-named Defendants hereby appeal to the United States Supreme Court from (1) the judgment of the court entered April 7, 1977; (2) the order of the Court entered April 7, 1977 denying Defendants' motions to reconsider the Court's opinion and to delay entry of judgment; (3) the opinion of the court entered March 22, 1977; (4) the order denying Defendants' motion to dismiss entered September 27, 1976; and (5) all actions of the Court necessary to support the afore-mentioned items.

Notice is also given that Defendants intend to file a protective appeal with the United States Court of Appeals for the Ninth Circuit, to suspend the appeal to that Court and to dismiss the protective appeal when the Supreme Court accepts jurisdiction of the appeal to it.

DATED this 29th day of Apil, 1977.

/s/ WAYNE L. KIDWELL
WAYNE L KIDWELL
Attorney General

/s/JAMES R. HARGIS
JAMES HARGIS
Deputy Attorney General

ATTORNEYS FOR DEFENDANTS

APPENDIX "E"
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

Civil No. 1-76-134
September 27, 1976

JANE DOE, et al.,
Plaintiffs,
v.
MILTON G. KLEIN,
Director of the Idaho Department of Health and Welfare, et al.,
Defendants.

ORDER DENYING CERTIFICATION OF CLASS ACTION

The above-referenced matters are before the Court for determination. Briefs have been filed and examined. The parties have agreed that the Court may make such determination without oral argument.

After a study of the briefs of the parties and an exchange of memoranda by the judges, the Court takes the following unanimous view:

1. That the Court has jurisdiction over the parties and the subject matter involved in this litigation.

2. That at this point the case is not shown to be appropriate for class-action treatment.

IT IS THEREFORE ORDERED:

1. That the defendants' Motion to Dismiss for Want of Jurisdiction is denied.

2. Plaintiffs' prayer for certification of this case as a class action is denied.

BY DIRECTION:
/s/RAY MCNICHOLS
RAY MCNICHOLS, *Judge*
United States District Court
FOR THE COURT.

APPENDIX "F"
EXCERPTS FROM
APPELLANTS' REGULATIONS

3162.2

Payments as Medical Assistance shall *not* be made for the following:

(a) Elective medical and surgical treatment; (7-1-66)

(b) Physical therapy modalities provided in physicians offices which are not supported by the diagnosis and adequate explantion on the claim; (5-1-68)

(c) Cosmetic surgery; (7-1-66)

(d) Injectible vitamins which are supported by the diagnosis and adequate explanation on the claim; (5-1-68)

(e) Prostheses and appliances; (7-1-66)

(f) All services and goods not specifically included in Section 3162.1. (7-1-66)

* * *

3164.9 Restrictions in Payment for Abortions

The forty-third regular session of the Idaho legislature amended the Department of Health and Welfare's appropriation bill in such a way that payments may not be made for abortions or abortion related services unless it is the recommendation of two (2) consulting physicians that the abortion is necessary to save the life or health of the mother, or unless the pregnancy is a result of rape or incest as determined by the courts. (7-1-76)

Payments for abortions and abortion related services will not be made after July 1, 1976, unless the above criteria are met. Because it takes approximately thirty days for the Department to process most medical claims, physicians, hospitals, and other providers of medical services should be urged not to submit claims for abortions after June 1, 1976, which do not meet the above criteria. (6-1-76)

CERTIFICATE OF SERVICE

I, the undersigned counsel for Appellants and member of the bar of the Supreme Court of the United States, do hereby certify that on the 31st day of June, 1977 I duly served three copies of the foregoing jurisdictional statement by depositing said copies in the United States mail, first-class postage prepaid, addressed to all counsel of record in the court below as follows:

Mr. Patrick Riceci
P.O. Box 1006
Boise, Idaho 83701

Mr. Michael E. Donnelly
P.O. Box 124
Boise, Idaho 83701

Mr. Dennis Gibala
Idaho Legal Aid Services, Inc.
104½ So. Capitol Blvd.
Boise, Idaho 83706

I also certify that all parties required to be served have been served.

Wayne L. Kidwell

WAYNE L. KIDWELL
Attorney General
State of Idaho

ATTORNEY FOR DEFENDANTS